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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: MAY 11 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a doctoral candidate at the City University of New York (CUNY), where he has completed his course work but not his dissertation. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

In this decision, the term "prior counsel" shall refer to attorney [redacted] who represented the petitioner prior to the appeal. The term "counsel" shall refer only to the present attorney of record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on September 16, 2010. The petitioner claimed no employment or experience outside of CUNY, where he has been a student since 1999. In an accompanying statement, prior counsel stated:

> Petitioner/Beneficiary has made pioneering contributions in the field of neuroscience/ neuroanatomy, significantly in the research of two areas: (1) the neuroanatomical categorization of brain cells (neurons) in the cerebral cortex and (2) the investigation of

> the interaction between environmental sensory information and the development of the brain.
>
> Petitioner/Beneficiary significantly contributes to the research of his laboratory, which is only one of a very limited number of laboratories in the world, let alone the United States, that uses a very innovative statistical modeling paradigm to characterize and decipher the neuronal structures within the cerebral cortex. The purpose of these elucidations is to decipher the basic parameters of a normal brain in order to advance our current understandings of more complicated systematic brain functioning and to provide a reference point for comparisons to diseased brains. . . .
>
> Petitioner/Beneficiary has also made significant and original research findings in the study of how environmental changes, such as sensory deprivation, before the brain is fully developed can have profound repercussions on the brain and nervous system's development. . . .Equally significant is his discovery that [these] changes . . . are mostly irreversible after a "critical period" in the developmental cycle has passed. . . .
>
> Petitioner/Beneficiary's research contributions have been internationally recognized as significant. . . .
>
> Petitioner/Beneficiary has been and will continue to be a key and irreplaceable research scientist for [a] federally funded project.

Prior counsel devoted much of the introductory statement to quotations from eight witness letters included in the initial filing. Prior counsel observed that the witnesses represent a variety of academic institutions. Dr. [redacted] associate professor at Queens College, CUNY, signed a letter that reads, in part: "[The petitioner] has worked in my laboratory . . . for the past five years as part of his Masters degree in Psychology prior to entering our doctoral program in Neuropsychology." The letter described the petitioner's research in technical detail, stating, for instance: "he provides quantitative evidence that the spine densities and morphologies of the excitatory neurons within the thalamocortical recipient zones (layers 4 and 6) are differentially impacted by sensory deprivation." The letter asserted that the petitioner's "efforts so far have signaled [*sic*] him out as an elite student in the field," whose "ability to work independently and learn and optimize new techniques is laudable and will serve him well as his career progresses." The letter concluded:

> [The petitioner] is in the top 1% of students in our program. His strong research background coupled with his ability to function independently makes him an outstanding candidate for permanent resident status. [The petitioner's] past research has already generated significant impact on research on cortical circuitry and its development and his future service in this area of research will yield even more important contributions that are clearly in United State's [*sic*] best interest. It is undeniable that his departure from the U.S. would be very detrimental to this field of research.

The electronically reproduced signature of Dr. [redacted] an associate professor at the Massachusetts Institute of Technology, appears on a letter that reads, in part:

> I am also a collaborator with [the petitioner's] mentor, Dr. [redacted] . .
>
> His novel work is part of a revolution in quantitative methods applied to brain analysis, and is absolutely indispensible to the field of neuroanatomy and systems neuroscience, and the United States will benefit tremendously from admitting [the petitioner] as a permanent resident. . . .
>
> [H]e presented his research findings, indicating that if an animal is neglected of sensory experience growing up, their brain does not mature properly, as indicated by changes in key markers for neural connections for learning and memory. Moreover, these associated changes are irreversible and last into adulthood. His result implies that if children are not getting enough environmental input growing up it can have serious consequences to their learning and memory capabilities in the adulthood [*sic*]. . . .
>
> **[The petitioner] is one of the most talented researchers in the field of neuroanatomy in terms of his overall competence, innovation, technical skill, past contributions, and the potential for future contributions.**
>
> . . . [The petitioner's] past research has already generated significant impact on research in this area and his future service in this area of research will yield even more important contributions that are clearly in United State's [*sic*] best interest.
>
> **It is undeniable that his departure from the U.S. would be very detrimental to this field of research.**

(Emphasis in original.) The concluding sentences in Dr. Moore's letter are nearly identical to those in Dr. Brumberg's letter, even including the same misspelling of "United State's." Because it is extremely unlikely that two individuals independently came up with the same language containing the same mistake, this shared language strongly implies common authorship or origin of the two letters.

Dr. Jonathan B. Levitt, associate professor at CUNY, "served as a faculty examiner on [the petitioner's] doctoral qualifying exam" but "do[es] not work with him personally." Dr. Levitt stated:

> The United States will benefit immensely by admitting [the petitioner] as a resident, because of his rare talent, expertise, and dedication. . . . In contrast, [the petitioner's] departure from [the] United States will directly put several lines of important work on hold, and will be a detriment to the field of systems neuroscience/neuroanatomy in the United States due to the level of technical and conceptual expertise that these projects require.

Professor Daniel J. Simons of the University of Pittsburgh stated:

> Dr. Brumberg and I are collaborators on a grant funded by the National Institutes of Health to study microcircuits in the brain that underlie sensation and perception. Although I have not worked with [the petitioner] personally, his work in Dr. Brumberg's laboratory has been important for the success of our collaborative research. . . .
>
> A crucial component of our collaborative work is study of the structure of specific types of nerve cells in the brain. . . . As a doctoral student in Dr. Brumberg's laboratory, [the petitioner] has been instrumental in this work. Using a novel analytical approach, [the petitioner] discovered a previously unsuspected large variety of neurons in the brain region that is the focus of our work and of many others in the field as well. The findings have important theoretical implications for understanding higher brain functions and disorders of cognition due to birth-related abnormalities, aging or trauma.

Dr. Serge Somrov, clinical assistant professor at New York University School of Medicine, stated:

> [The petitioner] has designed several statistical models for many of our projects to help us analyze data in a very quick and productive way. In addition, his knowledge regarding the workings of the neuroimaging and radiological aspects of research is also very impressive and has therefore contributed immensely to our productivity in the medical research environment. I am proud to state that he is one of the most gifted research "problem solver[s]" when it comes to statistical data processing and interpretation. Without some of his extensive knowledge and insight, many of our projects would have been tremendously delayed.
>
> With regards to his own research, [the petitioner] is indeed an upcoming neurologist who has quickly emerged and contributed significantly to the way we understand how our brain works. . . . He is among the very few researchers in the world who have done extensive, beautiful, and detailed anatomical research on a region of the brain which is crucial for our movements and perceptions. In addition, [the petitioner's] work also provided a brand new method of elucidating the functioning of not just this region of the brain, but the individual cells.

The electronically reproduced signature of Dr. [redacted] associate professor at Yale University, New Haven, Connecticut, appears on a letter that reads, in part:

> I have never personally worked with [the petitioner], but have become aware of his lines of research through my personal communications with colleagues as well as through his publications and conference presentations. . . . [H]e has quickly developed into a talented researcher, and has completed several important research projects.
>
> . . . [The petitioner's] work is of paramount importance in contributing to our current understanding of the brain.

[redacted] of the Washington University School of Medicine, St. Louis, Missouri, stated:

> I have not worked alongside with [the petitioner] and I do not know him well on a personal level. We have conversed about science several times at national conferences. My considered evaluation of his scientific work is principally based on reading his published work and hearing his recent presentations at national meetings for several years.
>
> [The petitioner's] research targets understanding brain circuits, and how these specific circuits are altered by different environmental changes. [The petitioner], using several very sophisticated statistical algorithm and theoretical frameworks, separated the neurons in the barrel cortex from a quantitative approach into distinct classes. This has high impact in the field of neuroanatomy, because historically the neuroscientists have been rather subjectively [*sic*] in identifying the functional neuronal classes.
>
> [The petitioner's] innovative approach is to quantitatively categorize functions of neurons. It is innovative because it provides objectivity and can pave the way for future neuroanatomists to follow.

The electronically reproduced signature of [redacted] assistant professor at Baylor College of Medicine, Houston, Texas, appears on the final letter, which reads, in part:

> I am very qualified to judge [the petitioner's] scientific expertise and qualities. A copy of my curriculum vitae is attached for your information.[1]
>
> I have not worked with [the petitioner] in the past, but have become aware of his research through reading his published work as well as personal communications of fellow neuroscientists in the field. One of [the petitioner's] lines of work involves using very innovative statistical modeling paradigms to characterize and decipher the neuronal structures within the cerebral cortex. Currently, only a very limited number of laboratories are using this novel and unique approach to objectively classify neuronal morphological features with the brain, and [the petitioner] is one of them, thus making his expertise a rarity amongst the neuroscience community.

Several of the witness letters, like the last one quoted above, spotlighted the petitioner's rarely-seen expertise with particular laboratory equipment and/or statistical methods. The witness letters did not indicate that the petitioner created the equipment or methods, only that he is one of a relative few who have mastered them. An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. *NYSDOT*, 22 I&N Dec. 221, n.7.

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[1] The record does not include a copy of Dr. [redacted] *curriculum vitae*.

The petitioner documented three published journal articles and several conference papers. All of the petitioner's peer-reviewed journal articles and most of his conference presentations appeared less than two years before he filed the petition. Four of the petitioner's seven submitted conference abstracts originate from one meeting, the 2009 Neuroscience Meeting, held in Chicago, Illinois, in October of that year. As noted above, several witness letters contained praise for the petitioner's published and presented work, but the petitioner submitted no objective documentary evidence (such as independent citations) to show the impact of this work.

On May 27, 2011, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence of the past impact of his past work. The director added that the absence of citation evidence is generally an unfavorable factor with respect to the national interest waiver.

In response, the petitioner documented nine citations of one of his articles, including a self-citation (the sixth citation on the submitted list). Prior counsel contended that "Petitioner/Beneficiary's research and publication record clearly demonstrate that he is a most accomplished research scientist in his field and is more skilled than his peers in the same research field." The premises prior counsel offered in support of that conclusion are not persuasive. Prior counsel, for instance, pointed to the reputations of the journals that have carried the petitioner's articles, and contended that the petitioner's work must be of an unusually high quality to warrant acceptance in such distinguished publications. The petitioner submitted nothing from the publishers of the journals to support these claims. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted three new witness letters. A second letter from Dr. Brumberg indicated that nine citations "is a high number given the relative recency of the publication and this number will only grow over the next several years." An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(8). It cannot suffice for the petitioner or witnesses to claim that the evidence of eligibility will gradually become apparent "over the next several years." Furthermore, the petitioner did not support the claim that nine citations "is a high number given the relative recency of the publication," for instance by providing citation figures for other articles that appeared in the same issue of the same journal.

Dr. Brumberg contended that it would "be a futile effort" "to find an adequate replacement for [the petitioner's] expertise." With respect to replacing the petitioner, the denial of the waiver does not nullify his existing F-1 nonimmigrant student visa that has allowed him to study and perform research at [redacted] since 1999, and the record contains no evidence that [redacted] has sought to employ the petitioner in any capacity after he completes his doctoral dissertation.

The next letter bears the electronically reproduced signature of [redacted] August University in Göttingen, Germany. The letter reads, in part:

> I was recently invited to author and publish an article on the topic of brain circuitry on Scholarpedia, a peer-reviewed and open-access encyclopedia. . . .

I decided to cite [the petitioner's] work . . . due to several reasons:

1. It was an extensive and impressive amount of work that has significantly contributed to our current understanding of a very multi-diverse and extremely understudied cortical layer of the cerebral cortex, thereby enhancing our currently [*sic*] understanding of brain functioning.
2. It was published in a **high impact** peer-reviewed journal which is considered the premier journal for neuroanatomy.
3. This piece of work was innovative, which advanced a novel quantitative approach to classifying the basic neuronal elements of the brain. There are a relatively **limited number of neuroscience researchers in the world, who undertake these types of studies**.

(Emphasis in original.) Dr [redacted] clinical assistant professor at New York University School of Medicine, stated:

I have never worked with [the petitioner] before, but have gained knowledge of his important research through reading the articles as well as words of mouth [*sic*]. [The petitioner's] work lays down the fundamental knowledge necessary for us medical practitioners to translate and provide better understand and service to the general public. His work field in Neuroscience/Neurology is extremely important for the benefit of [the] United States of America for these important reasons:

1. Brain related disorders (neurological/psychiatric) is [*sic*] one of the major issues currently in the medical fields in [the] United States. [The petitioner's] work, based on my professional assessment, has immense potential to be translated to several important neurodevelopmental issues in [the] medical community such as Autism Spectrum Disorders, Attention Deficit/Hyper Disorders, Childhood PTSDs, among others.
2. To my knowledge, [the petitioner] has been participating in a few studies that were funded by the governmental projects such as the National Institute of Neurological Disorders and Stroke, which is a division of the National Institute[s] of Health. His continued effort in leading future scientific projects will have great potential to benefit the best interest of [the] United States in terms of healthcare and biomedical scientific communities.

The director denied the petition on July 29, 2011. The director quoted from several of the witness letters and acknowledged their praise of the petitioner, but also found the petitioner's citation history to be minimal. The director stated that USCIS will not approve a national interest waiver based on the overall importance of an area of research, or subjective and speculative assurances that the importance and impact of the petitioner's work will become clearer in the future.

On appeal, counsel states:

> There are three sorts of key errors in the Service Center's decision being appealed (the "Decision"). First, the Decision incorrectly discounts the future relevance and impact of the Petitioner's work. Second, and relatedly, the Decision appears to be in some respects imposing a standard more suited to an EB-1 petition for an alien claiming to be of extraordinary ability than to a National Interest Waiver. Third, the Decision contravened the regulations regarding Requests for Evidence, because the Service Center specifically requested evidence of citations and letters of reference from persons who had become familiar with the Petitioner through his work, but then disregarded this evidence when it was provided, and instead denied the petition on other grounds.

Counsel then elaborates on these three points. Counsel observes that *NYSDOT* refers to "future contributions of a sort that can be anticipated without speculation based on the applicant's past record," and contends that the director erred in stating "a national interest waiver cannot be granted on the basis of the potential future implications of [the petitioner's] work."

The director, in the quoted passage, was not referring to the petitioner's "future contributions . . . that can be anticipated without speculation." The director's comment immediately followed speculative quotations from witness letters, discussing not the petitioner's anticipated future work, but hypothetical scenarios. Specifically, witness letters indicated that the petitioner's work "has the potential of influencing the U.S. educational system" [redacted]), "has immense potential to be translated to several important neurodevelopmental issues" [redacted] and "will be a tremendous help to quality of life issues and healthcare in the United States" [redacted] The record does not indicate that the petitioner's work has already had demonstrable influence or impact in any of those areas, and therefore the assertion that his work "has the potential" for future influence amounts to speculation.

Counsel asserts that the petitioner has documented "demonstrable prior achievements" that qualify him for the waiver, such as one of his articles having "already been cited eight times." With respect to the director's finding that influential research should have produced more citations, counsel states: "The relevant question under the *NYSDOT* standard is not . . . the degree to which the Petitioner's 'previous work . . . would serve the national interest.' Rather, the question is the degree to which the Petitioner's previous work justifies predictions that the Petitioner will be able to serve the national interest in the future."

The relevant paragraph from *NYSDOT* reads as follows:

> The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Id. at 219. The paragraph includes a footnote that reads, in part:

> The alien . . . must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole. . . . In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest.

Id. at 219, n.6. Because the petitioner "must have established . . . the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues," counsel is not correct in claiming that the extent of the petitioner's past impact is irrelevant.

Counsel cites the early work of Albert Einstein and Subramanyan Chandrasekhar as historical examples to show that, sometimes, the major significance of scientific research only becomes clear after the passage of time. Counsel has the benefit of hindsight in selecting these examples, a luxury not possible when discussing the early work of a researcher who had not yet earned his doctorate at the time of filing the petition (or the appeal). The national interest waiver did not exist in the 1930s when both Einstein and Chandrasekhar immigrated to the United States, and therefore there is no close parallel to allow a meaningful comparison. If future events establish the influence and importance of the petitioner's work, and the petitioner has not, in the meantime, obtained permanent immigration benefits some other way, then the petitioner may choose to reapply for the waiver at that time. USCIS, however, will not approve a waiver now based on the vague notion that it may come to regret a denial.

Counsel states that the director erred by failing to consider independent witness letters as objective evidence of the petitioner's impact. The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec.

158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Similarities between the witness letters, including at least one instance where two different witnesses used identical language, calls into question the actual origin and authorship of those letters. While many witnesses have endorsed the letters with their signatures, it is far from evident that the witnesses are responsible for the wording of the letters, and therefore the AAO cannot give substantial weight to that wording.

Witnesses have described the petitioner's work in varying levels of detail and declared it to be important, but the record lacks strong corroboration for claims about the significance and impact of the petitioner's work. Instead of demonstrating that the petitioner's work has already shaped research in his field, witnesses have offered conjecture about ways that various fields may feel the petitioner's influence in the future.

Furthermore, many of the witnesses who worked most closely with the petitioner emphasized his talent and potential, and the scarcity of his skill set. These factors may make the petitioner desirable to a potential employer, but they are not strong arguments for the waiver under *NYSDOT*.

Counsel notes that "one letter inviting [the petitioner] to [a scientific] conference . . . described Petitioner's work as a 'valuable contribution to the field.'" The generic reference to the petitioner's work as "valuable" carries little weight. The plain wording of section 203(b)(2)(A) of the Act makes it clear that an alien is presumptively subject to the job offer requirement, even if that alien's "exceptional ability in the sciences . . . will substantially benefit prospectively the . . . welfare of the United States." Clearly, the job offer requirement is not limited to scientists whose contributions are not "valuable."

Furthermore, the petitioner has not established the significance of the wording of the quoted letter, which accompanied the petitioner's response to the RFE. [redacted] Northwestern University, Evanston, Illinois, invited the petitioner to present a paper at an October 2009 conference. [redacted] ended the letter: "We sincerely hope that you would be able to attend this conference and present your work, as your research represents a valuable contribution to the field." This letter appears to be a "form" letter sent to all invitees. The petitioner's full name and address appear nowhere on the letter, and [redacted] did not discuss the specifics of the petitioner's work except to state the title of the paper. The record is devoid of evidence to show the acceptance rate of papers submitted to the conference organizers for consideration. (The AAO also notes that [redacted] the petitioner's mentor, appears to have been one of the primary organizers of that conference, delivering the opening remarks and conducting the "annual business meeting" during the proceedings.)

Counsel claims that the director imposed the more stringent requirements for classification as an alien of extraordinary ability (EB-1) under section 203(b)(1)(A) of the Act, which requires "sustained national or international acclaim." Counsel notes that the USCIS regulation at 8 C.F.R. § 204.5(h)(3)(v), which pertains to EB-1 petitions, calls for evidence of "original scientific . . .

contributions of major significance in the field." Counsel observes: "That standard need not be satisfied in order to obtain a National Interest Waiver."

Counsel's assertion is true as far as it goes. Nevertheless, it is equally true that, because exceptional ability in the sciences does not automatically result in exemption from the job offer requirement, the petitioner's accomplishments must exceed those necessary to establish exceptional ability in the sciences. The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) states that "Evidence of recognition for achievements and significant contributions to the . . . field by peers, governmental entities, or professional . . . organizations" can partially support a claim of exceptional ability. Thus, eligibility for the waiver rests in an admittedly gray area between "significant contributions" and "contributions of major significance." The director, in the present decision, did not require the petitioner to establish "sustained national or international acclaim" as section 203(b)(2)(A) of the Act requires, or to show that he "is one of that small percentage who have risen to the very top of the field of endeavor" as required by the regulation at 8 C.F.R. § 204.5(h)(2).

Counsel cites the regulations pertaining to RFEs, and contends that the director failed to follow those regulations. The regulations in question appear at 8 C.F.R. § 103.2(b)(8):

> (i) *Evidence of eligibility or ineligibility.* If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the application or petition will be denied on that basis.
>
> (ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.
>
> (iii) *Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

It is important to note that neither independent letters nor citations are "required initial evidence," *i.e.*, materials specified in the regulations as being necessary to establish a *prima facie* claim of eligibility for the benefit sought. The only "required initial evidence" specified in the regulations for national interest

waiver petitions is ETA Form 750B, Statement of Qualifications of Alien, required by the USCIS regulation at 8 C.F.R. § 204.5(m)(4)(ii). That same regulation also calls for "evidence to support the claim that such exemption would be in the national interest." The wording of this passage is deliberately vague because the nature of such evidence will vary depending on each individual alien's occupation and other factors. Thus, when the director requested citation evidence and independent letters, the director requested not "required initial evidence" under 8 C.F.R. § 103.2(b)(8)(ii), but rather "other evidence" under 8 C.F.R. § 103.2(b)(8)(iii).

Even then, the regulations quoted above repeatedly refer to instances in which "the required initial evidence . . . does not establish eligibility." Thus, the regulations make it clear that the submission of "required initial evidence" does not compel a finding of eligibility. The initial evidence amounts to the minimum of what the director needs in order to make an informed decision, not what is required for an automatic finding in the petitioner's favor.

Counsel asserts that "a request for evidence must advise the petitioner . . . of what USCIS considers to be missing – what gaps need to be filled in order to justify approval of the petition." Counsel continues: "The necessary concomitant of this rule is that if the requested evidence is supplied, the petition or application should be approved." This conclusion is fallacious. The director, in requesting independent witness letters and evidence of citations, did not promise to approve the petition upon receipt of those items, without consideration for their quality or content. Rather, the director stated that the petitioner had not submitted sufficient evidence to establish eligibility, and that independent witness letters tend to have more weight than letters from collaborators.

Regarding citations, the director did not guarantee the approval of the petition upon submission of citation evidence. Rather, the director stated that the initial submission contained no evidence of citation, and then asked the petitioner to "please clearly indicate the number of times and in which specific articles your work has been cited," and to submit documentary evidence to corroborate the figures provided.

For the above reasons, the AAO rejects the contention that, by responding to the RFE, the petitioner compelled the director to approve the petition.

Counsel contends:

> the *NYSDOT* test itself is unnecessarily and inappropriately rigid when looked at against the statute and regulations. . . .
>
> Nowhere in the statute or regulations is DHS forbidden from "grant[ing] national interest waivers on the basis of the overall importance of a given profession," *NYSDOT*, 22 I&N Dec. at 223. Although *NYSDOT* suggested that this "does not appear to have been the intent of Congress," *id.* at 222-223, waivers of the labor certification requirement on a group basis are hardly unknown. The Department of Labor currently provides group labor certifications for all properly qualified physical therapists, for example, *see* 8 C.F.R. 656.5(a)(1). . . . [T]he proper test should be a sliding scale, in

> which proportionally more meritorious fields of endeavor require proportionally less individual distinction.

The AAO notes that there is no regulation at 8 C.F.R. § 656.5(a)(1). Counsel apparently meant to cite the Department of Labor regulation at 20 C.F.R. § 656.5(a)(1). That regulation relates to Schedule A, a list of occupations for which the Department of Labor has "determined there are not sufficient United States workers who are able, willing, qualified, and available." Schedule A designation provides an alternative means of satisfying the statutory job offer requirement; it is not an exemption from that requirement.

Counsel does not explain why the proposed "sliding scale" has any more statutory or regulatory support than the framework in *NYSDOT*. As it stands, *NYSDOT* is a published precedent decision, binding on all USCIS employees including officers of the AAO. *See* 8 C.F.R. § 103.3(c).

Section 203(b)(2)(A) of the Act subjects aliens of exceptional ability in the sciences, the arts, and business, as well as members of the professions holding advanced degrees, to the job offer requirement. Section 203(b)(2)(B)(i) of the Act establishes the waiver on an individual, not occupational, basis, providing for the waiver for "an alien's services" rather than for broad fields of endeavor.

The provision quoted above does not mean that Congress lacks the authority to designate blanket waivers. Congress did, in fact, do so by enacting section 203(b)(2)(B)(ii) of the Act, which creates a categorical waiver for certain physicians. The enactment of that blanket waiver demonstrated that there are no blanket waivers implicit in section 203(b)(2)(B)(i) of the Act. If there were, then the physician waiver at section 203(b)(2)(B)(ii) of the Act would have been redundant.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.